

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

YESENIA PACHECO, LUIS LEMUS, and
SLP, minor child, by and through her
Guardian ad Litem Brian Comfort,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NO. 2:15-cv-01175

COMPLAINT FOR DAMAGES

Plaintiffs allege:

I. JURISDICTION AND VENUE

1.1 This action is brought pursuant to the authority of the Federal Tort Claims Act, Title 28, §§2671, et seq. and Title 28, §1346(b) of the United States Code.

1.2. Pursuant to 28 USC § 2672 and 2675(a) Plaintiffs timely filed and presented administratively a claim for damages on standard form 95 to Defendant's agency the United States Department of Health and Human Services . The United States Department of Health and Human Service has failed to resolve

COMPLAINT FOR DAMAGES- 1

ALVAREZ LAW

705 South 9th St., #304
Tacoma, WA 98405
Ph: (253) 474-8451

1 the claim. Thus, the option to file suit has now accrued and this action has been commenced with the time
 2 limits established by the Federal Tort Claims Act.

3 1.3 Plaintiffs have complied with all procedures as required by the Federal Tort Claim Act, Title
 4 28, §§2671, et seq. and Title 28, §1346 (b) of the United States Code, and this matter is ripe for filing.
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6 1.4 Venue is proper in the above-captioned District Court pursuant to 28 USC § 1391(e)
 7 due to the acts and omissions of employees of defendant described below in the above-captioned
 8 judicial district.
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10 1.5 The United States of America may be served with process in accordance with Rule
 11 4(1) of the Federal Rules of Civil Procedure by serving a copy of the Summons and of the
 12 Complaint on Annette L. Hayes, US Attorney, by certified mail, return receipt requested at the
 13 office, United States Government c/o US Attorney's Office, 700 Stewart St #5220, Seattle,
 14 Washington 98101-1271, to the attention of the Civil Process Clerk, and by serving a copy of the
 15 Summons and Complaint on Loretta Lynch, Attorney General of the United States, by certified
 16 mail, return receipt requested, at the Office of the General Counsel, General Law Division, Claims
 17 & Employment Law, Wilbur J. Cohen Building, Room 4760, 330 Independence Ave SW, Mail
 18 stop Capitol Place, Washington, D.C. 20201, to the attention of the Civil Process Clerk.
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23 II. PARTIES

24 2.1 Plaintiff Yesenia Pacheco was at all times relevant to this action a patient of Defendant
 25 through NeighborCare Health at 1629 North 45th Street, Seattle, Washington.
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27 2.2 Plaintiff Luis Lemus was at all times relevant to this action was the paramour of
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1 Plaintiff Yesenia Pacheco.

2 2.3 SLP was at all times relevant to this action the daughter of Plaintiff Yesenia Pacheco
3 and Luis Lemus. Brian Comfort was appointed Guardian ad Litem of SLP under Pierce County
4 Cause Number 13-2-13239-2.
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6 2.4 NeighborCare Health is a Federally Qualified Community Health Center located within
7 the territorial jurisdiction and venue of the above-captioned District Court. At all relevant times, it
8 employed persons who treated plaintiff as health care providers, who treated Plaintiff Yesenia
9 Pacheco, and who acted on behalf of the United States in providing such treatment and within the
10 scope of their employment.
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13 **III. FACTS**

14 3.1 On December 3, 2009, Plaintiff Yesenia Pacheco visited NeighborCare Health in order
15 to discuss options regarding birth control methods. Plaintiff Yesenia Pacheco desired to prevent
16 the birth of an unwanted child.
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18 3.2 On December 8, 2009, Plaintiff Yesenia Pacheco visited NeighborCare Health and
19 received a Depo-Provera Injection.
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21 3.3 Depo-Provera is a birth control method for women that must be administered once
22 every three months.
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24 3.4 On March 8, 2010 Plaintiff Yesenia Pacheco visited NeighborCare Health and
25 received a Depo-Provera injection.
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27 3.5 On May 11, 2010 Plaintiff Yesenia Pacheco visited NeighborCare Health for
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1 emergency pregnancy test. Plaintiff Pacheco had unprotected sex less than 24 hours prior. She
2 took Plan B, an emergency birth control medication. Although the Clinic's medical doctor
3 reviewed birth control options, there was no discussion of a birth control plan.
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5 3.6 On January 24, 2011 Plaintiff Yesenia Pacheco was seen at NeighborCare Health. She
6 received a Depo-Provera injection. There was no chart note documenting the administering of the
7 Depo-Provera injection.
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9 3.7 On April 12, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health for a
10 Depo-Provera injection. There was a chart note documenting the administering of the Depo-
11 Provera injection.
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13 3.8 On June 22, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health for low
14 back pain headaches and other medical issues. The chart note on this visit does not state that she
15 was receiving Depo-Provera injections.
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17 3.9 On July 5, 2011 Plaintiff Yesenia Pacheco was seen at NeighborCare Health for a
18 Depo-Provera injection. There was no chart note documenting the administering of the Depo-
19 Provera injection.
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21 3.10 On September 29, 2011 Yesenia Pacheco telephoned NeighborCare Health to
22 schedule a Depo Provera injection for the following day which is referred to as "Depo on time."
23 On September 30, 2011 Plaintiff Yesenia Pacheco appeared at NeighborCare Health for a
24 previously scheduled Depo-Provera injection. Yesenia Pacheco did not receive a Depo-Provera
25 injection. Yesenia Pacheco received a flu shot instead. The flu shot was administered by
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1 NeighborCare Health employee Gloria Rodriguez. Yesenia Pacheco did not request a flu shot,
2 did not consent to a flu shot, and was not informed that she received a flu shot in lieu of the
3 previously scheduled Depo Provera injection.
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5 3.12 On October 20, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health
6 for vaginal discharge and a Urinary Tract Infection (UTI). The chart note on the aforementioned
7 visit does not state that she was receiving periodic Depo-Provera injections.
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9 3.13 On December 13, 2011, while Plaintiff Yesenia Pacheco was at NeighborCare Health
10 Center, she scheduled an appointment for her next Depo-Provera injection. On that day, Plaintiff
11 Pacheco was informed that on September 30, 2011, she did not receive Depo-Provera injection
12 but a “Flu-Shot” instead.
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14 3.14 On December 14, 2011, Plaintiff Yesenia Pacheco visited NeighborCare Health for a
15 pregnancy test. The pregnancy test was positive. The clinic’s medical doctor noted that a “Flu-
16 Shot” was administered instead of the Depo-Provera injection. The doctor also stated that she
17 was unclear as to how the “miscommunication” occurred.
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20 3.15 On May 10, 2012, Plaintiff Yesenia Pacheco was diagnosed with Gestational
21 Diabetes.
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23 3.16 Throughout the pregnancy, Plaintiff Yesenia Pacheco experienced low back pain,
24 worry and depression.
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26 3.17 On August 2, 2012, Plaintiff Yesenia Pacheco delivered, by Emergency Cesarean
27 Section, SLP at 39 weeks and 4 days. Plaintiff Sandra developed clinical seizure activity involving
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1 convulsive movements of her right side for which she was administered phenobarbital.

2 3.18 Plaintiff Luis Lemus is the natural father of Plaintiff SLP

3 3.19 On August 6, 2012, Plaintiff SLP underwent a Brain MRI scan which revealed
4 unilateral perisylvian polymicrogyria (PMG) involving the left posterior frontal and perisylvian
5 region of the brain. Plaintiff SLP remained hospitalized from the date of her birth, August 2, 2012
6 to August 12, 2012.
7

8 3.20 Because of the left perisylvian PMG, Plaintiff SLP's motor skills, speech and
9 language skills, attention span and cognitive functions have been negatively impacted. Plaintiff
10 Sandra will require special education and physical therapy to help her with her development.
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12 3.21 Plaintiff SLP will have diminished motor skills, speech and language skills, attention
13 span and cognitive functions after she turns 18 years old.
14

15 3.22 NeighborCare Health is an agency of the United States of America. The United
16 States of America, Defendant herein, through its agency, NeighborCare Health, at all times
17 material hereto, owned, operated, and controlled the health care facility known as NeighborCare
18 Health, located in Seattle, Washington. NeighborCare Health, staffed said health care facility with
19 its agents, servants and/or employees. All the personnel who were involved in the care of Plaintiff
20 Yesenia Pacheco since December 2009, including Dr. Allison Fitzgerald, M.D., Dr. Wendy
21 Johnson, M.D., Cheryl Smally, ARNP and medical assistants were in the employment of
22 Defendant and acted as agents of Defendant.
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IV. CAUSES OF ACTION

4.1 This is a Federal Tort Claims Action for monetary damages sustained by Plaintiff Yesenia Pacheco, Plaintiff Luis Lemus and Plaintiff SLP resulting from personal injuries each sustained as a result of the negligence of the employees at NeighborCare Health Center in preventing an unwanted pregnancy.

4.2 By failing to administer the Depo-Provera injection to Plaintiff Yesenia Pacheco, NeighborCare Health failed to exercise that degree of care, skill, and learning expected of reasonably prudent health care providers at the time in the profession or class to which they belonged, in the State of Washington acting in the same or similar circumstances.

4.3 NeighborCare Health's employees negligently failed to maintain adequate charting and documentation of Plaintiff Yesenia Pacheco's medications, which included Depo-Provera. The failure to document in her medical records that Plaintiff Yesenia was receiving Depo-Provera caused the health care provider to not administer Depo-Provera on September 30, 2011. By failing to adequately chart and document that Plaintiff Yesenia Pacheco was receiving Depo-Provera injections, NeighborCare Health failed to exercise that degree of care, skill, and learning expected of reasonably prudent health care providers at the time in the profession or class to which they belonged, in the State of Washington acting in the same or similar circumstances.

4.4 NeighborCare Health's employees negligently failed to adequately chart and document what Plaintiff Yesenia Pacheco was doing for contraception and when her last menstrual period had occurred. By failing to adequately chart and document what Plaintiff Yesenia Pacheco was

1 doing for contraception and when her last menstrual period had occurred, NeighborCare Health
 2 failed to exercise that degree of care, skill, and learning expected of reasonably prudent health
 3 care providers at the time in the profession or class to which they belonged, in the State of
 4 Washington acting in the same or similar circumstances.
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6 4.5 NeighborCare Health's employees negligently failed to maintain adequate charting and
 7 documentation of the medications that were administered to Plaintiff Yesenia Pacheco, which
 8 included Depo-Provera on January 24, 2011, April 12, 2011 and July 5, 2011. By failing to
 9 adequately chart and document the medications that were administered to Plaintiff Yesenia
 10 Pacheco, NeighborCare Health failed to exercise that degree of care, skill, and learning expected
 11 of reasonably prudent health care providers at the time in the profession or class to which they
 12 belonged, in the State of Washington acting in the same or similar circumstances.
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 14

15 4.6 Such failures stated above were proximate causes of Plaintiff Yesenia Pacheco's
 16 unwanted pregnancy and giving birth to Plaintiff SLP, who was born with a brain malformation,
 17 unilateral perisylvian polymicrogyria.
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20 V. DAMAGES

21 5.1 As a direct and proximate result of Defendant's negligent acts and/or omissions to
 22 perform the medical care with due care, Plaintiff Yesenia Pacheco and Plaintiff Luis Lemus have
 23 incurred medical bills and bills for treatment, other damages and is entitled to recover for pain and
 24 suffering, and the full value of all other categories of damages permissible by law due to the
 25 unwanted pregnancy.
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1 5.2 As a direct and proximate result of Defendant's negligent acts and/or omissions to
 2 perform the medical care with due care, Plaintiff Yesenia Pacheco and Plaintiff Luis Lemus gave
 3 birth to Plaintiff SLP who has a brain malformation, unilateral perisylvian polymicrogyria which
 4 will require medical bill and bills for treatment, other damages and is entitled to recover for pain
 5 and suffering, and the full value of all other categories of damages permissible by law.
 6

7 5.3. As a direct and proximate result of Defendant's negligent acts and/or omissions to
 8 perform the medical care with due care, Plaintiff SLP sustained a wrongful life which will require
 9 medical bill and bills for treatment, other damages and is entitled to recover for pain and suffering,
 10 and the full value of all other categories of damages permissible by law.
 11

12 5.4 Defendant is liable to Plaintiffs pursuant to RCW 7.70.030(1) as interpreted by
 13 *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983) for Defendant's act of
 14 injecting a flu vaccine to Plaintiff Yesenia Pacheco in lieu of Depo-Provera, her regularly
 15 scheduled birth control injection, on September 30, 2011, resulting in an unintended pregnancy
 16 and birth of Plaintiff SLP. In so doing, defendant's employee Gloria Rodriguez failed to exercise
 17 that degree of care, skill, and learning expected of a reasonably prudent health care provider at
 18 that time in the profession or class to which she belongs, in the state of Washington, acting in the
 19 same or similar circumstances. Such failure was a proximate cause of the injury complained of,
 20 i.e., the unintended pregnancy and birth of S.L.P., and resulting birth defects.
 21

22 5.5 Defendant is liable to Plaintiffs pursuant to RCW 7.70.030(3) for Defendant's
 23 failure to inform Yesenia Pacheco that she was to be injected with a flu vaccine in lieu of Depo-
 24

1 Provera, her regularly scheduled birth control injection, on September 30, 2011, and failure to
2 obtain her consent to a flu shot in lieu of Depo-Provera on September 30, 2011, resulting in an
3 unintended pregnancy and birth of Plaintiff SLP. In addition, Defendant failed to inform Yesenia
4 Pacheco of the risk of unintended pregnancy which was associated with not having the Depo-
5 Provera shot on the scheduled date.
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7 **VI. RELIEF**

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9 WHEREFORE, the Plaintiff prays as follows:

- 10 1. For judgment in favor of Plaintiffs and against the Defendant;
- 11 2. For an award of damages in favor of the Plaintiffs and against the Defendant in amounts
12 to be proven at the time of trial;
- 13 3. For an award of prejudgment interest at the statutory rate on Plaintiffs economic
14 damages;
- 15 4. For an award of prejudgment interest on Plaintiffs' non-economic damages to the extent
16 allowed by law;
- 17 5. For an award of Plaintiffs costs and disbursements herein'
- 18 6. For an award of attorney's fees and
- 19 7. For such further relief as the Court deems just.

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24 DATED this 31st day of March, 2017.
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28

1 /s/ Steve Alvarez

2 Steve Alvarez, WSBA # 23051
3 Alvarez Law
4 705 S 9th Street, #304
5 Tacoma, WA 98405
6 steve@alvarezlaw.com
7 (253) 474-8451

8 Attorney for Plaintiffs

9 DATED this 31st day of March, 2017.

10
11
12 /s/ Michael A. Maxwell

13 Michael A. Maxwell, WSBA# 21781
14 Maxwell Graham, PS
15 1621 114th Avenue SE, Suite 123
16 Bellevue, WA 98004
17 206.527.2000
18 mike@maxwellgrahamlaw.com
19 Attorney for Plaintiffs